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Issue Date: 30 July 2004

CASE NO.: 2003-LHC-0394
OWCP NO.: 06-187011

In the Matter of:

ROY BURTON,
Claimant,

v.

CONBULK MARINE TERMINALS/
AMERICAN LONGSHORE MUTUAL ASSOCIATION
c/o F.A. Richard & Associates,
Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Ralph R. Lorberbaum, Esq.
For the Claimant

Shari S. Miltiades, Esq.
For the Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq.* Claimant is seeking disability and medical benefits for an alleged work-related injury to his left knee on March 31, 2001 which he claims left him permanently and totally disabled (ALJX 2; Tr. 7).¹

¹ The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

A formal hearing was held in this case on July 21, 2003 in Savannah, Georgia at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. Claimant offered exhibits 1 through 10 which were admitted into evidence.² Employer offered exhibits 1 through 10 which were admitted into evidence. ALJX 1 through 4 were marked for identification and admitted into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. STIPULATIONS

The parties have stipulated (Tr. 5-7) and I find:

1. That the parties are subject to the Act.
2. That Claimant and Employer were in an employee-employer relationship at all relevant times.
3. That Claimant filed a timely claim for compensation.
4. That Employer filed a timely first report of injury and notice of controversion.
5. That Claimant's average weekly wage at the time of the injury was \$692.31 resulting in a compensation rate of \$461.54.
6. That there has been no voluntary payment of compensation by Employer.

II. ISSUES

1. Injury arising out of and in the course of employment.
2. Nature and extent of disability.

III. STATEMENT OF THE CASE

Testimonial and Non-Medical Evidence

Roy Burton

On direct examination, Claimant testified that he was born on December 20, 1945. Tr. 17. He testified that on March 31, 2001, he sustained an injury while working for Employer. *Id.* As of that date, he had been working for Employer for approximately eleven months. *Id.*

Claimant testified that he began working for Employer as a clerk checker in charge of checking in cargo that was being loaded and unloaded from ships. *Id.* Approximately six months later, he was promoted to stevedore foreman, and this was his title at the time of the alleged injury. Tr. 17-18. Claimant described his duties in this capacity as follows:

² Exhibits 7 and 8 were withdrawn during the hearing (Tr. at 10-11).

[I] would arrive at the ship a half an hour before the longshoreman gangs, or crews, and would set up those crews with the foremans [sic] at each hatch, and assign to them a body of people. They would go ahead and get those people together and we would board the ship and be ready to go at 0700, or either 1900, depending on if it was dayshift or nightshift. My job was to make certain that the work area was clean, . . . safe, and that each hatch had a foreman. I watched the loading and discharging of the ship.

Tr. 18. Claimant explained that the loading and unloading of cargo took place at two different docks along the Savannah River: the Eastcoast Terminal and Southern Bulk Industries Terminal. *Id.* As a stevedore foreman, Claimant was required to go onboard ships. Tr. 18-19. He went on and off the ships by way of a gangway, as did the longshore crews. Tr. 19. He worked both dayshifts and nightshifts, each being approximately twelve hours long. *Id.* He was assigned his shift by superintendent Harold McCarthy. Tr. 20.

Before he began working for Employer, Claimant had worked for Atlantic Technical Services (ATS) located on the Georgia Ports Authority for approximately two years as a terminal supervisor, but was laid off for lack of work. *Id.* While working for this company, Claimant sustained an injury to his right knee, which he described as follows:

I was coming out of an empty 40 foot sea container and I stepped down to the ICC bar. I slipped on the ICC bar. And I also hit the – a piece of wood at the bottom and that's when I turned and wrenched my knee.

Tr. 21. He had to undergo surgery as a result of this injury but was able to return to work with the same company. *Id.*

Claimant further testified that he had prior experience working as a stevedore in the 1970's. *Id.* According to Claimant, when he began working for Employer, his medical condition was good. *Id.* Although his right knee was "bothersome from time to time," he was able to do his job. Tr. 22. Claimant testified that in May 2000 he suffered a stroke on the job and missed approximately four months of work as a result. Tr. 22-23. He did not file a claim for this medical condition. Tr. 22. When he returned to work around September or October 2000, he was able to perform the duties of the stevedore position until his March 31, 2001 injury. Tr. 23.

According to Claimant, he was working as a stevedore foreman both on the docks and onboard a ship at either Eastcoast Terminal or Southern Bulk Industries on March 31, 2001. Tr. 23-24. He described his alleged accident that day as follows:

About 0300 we had just got the paperwork signed from the chief mate and the captain. I was the last person that was coming off the vessel. We had completed the ship, as I said, and all the crews were off the ship at that point. When I started down the gangway the river was very low and the gangway was flattened out. It didn't have any steps to it. It was very damp. My right leg slipped and I went down completely full force on my left knee. Pinned my left knee between the

upright and my foot went against the other upright. The upright is the thing that holds the handrails up. I pulled the knee right into that upright.

Tr. 24. Claimant testified that he was able to get up, but first “had to sit there about five minutes in order to maintain my composure.” *Id.* He testified that he felt substantial pain in his left knee and foot, as well as in both soles of his feet. *Id.* When asked who else was present on the gangway at the time of this injury, Claimant testified that there was a black man in front of him (whom Claimant could not identify) “and then Joey Hurst was in front of him.” Tr. 25.

Claimant testified that he informed one of Employer’s supervisors of this injury following the accident. According to Claimant,

[W]hen I got back up to the office that morning the only supervisor that was there was Jim Traver. When I got out of my truck I was limping up towards the table. We had this table, like a picnic table, on the back patio at the office. We all used the back door. I was walking up and Jim hollered at me, he said, hello, Roy boy, why are you limping?

When I walked up to the table I told him, I said, Jim, I slipped and fell on the gangway last night. He said, do you need to go see a doctor? I told him, no.

Tr. 25. Claimant explained that he did not ask to see a doctor at that point because he had just missed four months of work due to a stroke and “was pretty up in age there. I was very, very concerned I’d make waves and probably lose my job because of it.” Tr. 25-26. He added that at the time of this injury, he did not think it was serious enough to require a visit to a doctor. Tr. 28.

Claimant testified that he had previously injured his left knee around 1994 while working for Fort Howard Paper Corporation. Tr. 26. As a result of his injury, he underwent surgery on his left knee. Tr. 27. During the period of time between this surgery and the March 31, 2001 injury, Claimant experienced pain, swelling, redness, and fluid in his left knee. *Id.* However, according to Claimant, any problems with his knees that existed before he began working for Employer did not prevent him from doing his job until the March 31, 2001 accident. *Id.*

Claimant further testified that following the March 31, 2001 injury, he treated his left leg with a muscle stimulator and a knee brace, used Vioxx for pain, and used ice to reduce swelling in the knee. Tr. 28. After the injury, he continued to work for Employer. *Id.* Claimant testified that he made a notation in his journal under March 31, 2001, which states that he worked on a ship named Snowbird and “fell on gangway at 02:00 hurting left knee” Tr. 29; CX 3. Claimant explained that he brought this journal with him to every vessel and used it to record the name of the ship he was working on, his daily hours, and any injuries sustained by the workers. *Id.*

Claimant stated that he continued to work for Employer after March 31, 2001, up until the time of his termination on May 30, 2001. *Id.* He continued to perform his regular duties, including going up and down gangways and working on ships and the docks. Tr. 30. During this period of time, he felt a little pain in his left knee, but managed to bear it. *Id.* He stated that

“from time to time, or just about every day, I wore a knee brace. I used the stimulator at lunch time and at home at night. Naturally I didn’t have any ice, but at home at night I would put ice on it.” *Id.* He explained that he obtained a muscle stimulator from his son-in-law, who works for Impu Corporation. *Id.*

Claimant reiterated that although he had some problems with his left knee prior to the March 31, 2001 injury, those problems never kept him from doing his job for Employer. *Id.* After this injury, his knee got worse. *Id.* Claimant testified that, to his knowledge, he was terminated because of stevedore restructuring. Tr. 31. Claimant added that between the time of his March 31, 2001 injury and his termination, he did not miss any time at work due to his left knee condition. Tr. 32. At the time of his termination, his left knee continued to hurt. *Id.* Claimant testified that following this injury, he has seen Dr. Palmer, an orthopedic knee specialist, regarding his left knee. Tr. 32-33.

Claimant testified that, after his termination by Employer, he engaged in an extensive job search, as evidenced by several newspaper clippings advertising various jobs with handwritten annotations made by Claimant concerning his contacts with potential employers. CX 5, 6. Claimant further testified that all of the advertisements correspond to positions that he actually applied for by sending his resume or filling out job applications. Tr. 33.

In January 2002, Claimant obtained a job with Custom Woodwork and Plastics where he was paid \$12.00 per hour plus overtime at time and a half. He left there after about three or four weeks because he was unable to work eleven hours a day due to pain from an Achilles tendon injury which was unrelated to his work at Conbulk. Tr. 33-35.

Claimant testified that after he left Custom Woodwork, he worked as a supervisor with a company called Atlas Foods, which was “in the vending business, snack machines, drink machines, candy machines.” Tr. 35. He was paid a salary of \$500 a week. Tr. 36. He worked for this company for only three weeks because his job required him to ride a motor scooter with vending supplies “down the ramps where . . . aircraft are constantly moving,” and one day he nearly collided with an airplane. Tr. 35-36.

Claimant next found work with Powers Transportation Services as a line haul dispatcher. Tr. 37. Claimant was paid \$576.00 per week, and his job consisted of instructing drivers as to the proper destination for cargo deliveries. Tr. 37-38. After three months on the job, Claimant was told to either quit or be terminated. *Id.* at 37. According to Claimant he was forced to leave because he was too slow. *Id.* He explained: “I had a stroke and my mind is just not as quick as it used to be. I had some trouble learning their computer system. My mind wasn’t just thinking as fast as they wanted it to think.” *Id.*

Claimant testified that after leaving Powers, he stopped looking for work. Tr. 38. He filed for Social Security due to “my stroke, my peripheral vision, both my knees, my Achilles tendon, I’m diabetic, I have high blood pressure. I can go on and on.” *Id.*

After the March 31, 2001 injury, according to Claimant, he did not sustain any other injuries to his left knee. *Id.* He testified that since the time of that injury, his left knee has gotten

worse. *Id.* After he stopped working for Employer, Claimant continued to take Vioxx and use a muscle stimulator. *Id.* at 39. However, eventually “it got to a point where it wasn’t helping,” which finally prompted him to see a doctor. *Id.* Claimant testified that his left knee is worse now than it was before the March 31, 2001 injury. *Id.*

On cross-examination, Claimant testified that he applied for Social Security disability benefits on January 31, 2002 and is still awaiting a decision. Tr. 39-40.

Claimant reiterated that he was fired from Powers Transportation because he was too slow. Tr. 40. He testified that he had resigned from his job with Atlas Foods because he was afraid his vision was not good enough to perform his job due to his stroke. Tr. 41. Claimant further testified that he left his job with Custom Woodworks because of the problems with his Achilles tendon. Tr. 42.

Claimant also acknowledged that, after he left Conbulk and before he started his job with Custom Woodworks, he was contacted about the possibility of stevedoring a ship in South America. *Id.* He admitted that during his deposition he testified he was going to accept this position. Tr. 43-44. He also acknowledged that he informed Dr. Sauers of his intention to accept this job in July 2001, as reflected in Dr. Sauers’ treatment notes.³ Tr. 43. However, Claimant denied making plans to accept this job, stating that he “didn’t make any arrangements. It never got that far.” Tr. 43. According to Claimant, he did not take this job due to an illness of his mother-in-law. *Id.* He added that “[i]f it hadn’t have been for that, yes, I would have taken it probably. I needed the money.” *Id.*

Claimant acknowledged that his Achilles tendon injury was not job-related. *Id.* He noticed this problem on a trip to Las Vegas after he stopped working for Employer, as reflected in Dr. Allen’s report. Tr. 44-45; EX 3 at 10.

Claimant reiterated that his duties as a stevedore foreman for Employer included taking injury reports from his co-workers. Tr. 45. He also testified that he did not prepare an accident report when he was injured on March 31, 2001. *Id.* When asked whether he was supposed to prepare his own injury report, Claimant responded “I wouldn’t think so. . . . [M]y supervisor would have wrote [sic] mine up. I guess you could do it that way, but I’ve never done it that way.” *Id.* Claimant indicated that this was the only work-related injury he sustained on this job. *Id.*

Claimant testified that prior to his March 31, 2001 injury, he had had three work-related injuries while working for different employers. Tr. 46-48. He acknowledged that he promptly reported each of these injuries and sought medical treatment. *Id.* The most recent of the injuries was a right knee injury which he sustained while working for ATS.⁴ *Id.* at 46. As a result of the injury, he missed approximately three months of work and underwent surgery performed by Dr. Murray. *Id.* Prior to this injury, he sustained a back injury while working for Bowmark Transportation. *Id.* In 1994, he also sustained a left knee injury while working for Fort Howard

³ Dr. Sauers’ July 11, 2001 treatment note, states: “Roy is about to take a trip to South America where he will stevedore a ship.” (EX 2 at 18).

⁴ Claimant worked for this company from 1998 to 2000 (EX 10 at 4).

Paper Corporation.⁵ *Id.* As a result of this injury, he underwent surgery and was later hospitalized due to an infection, missing at least six to eight months of work. *Id.* Following the surgery, Claimant filed a Workers' Compensation claim under Georgia state law and was assigned a permanent fifteen percent disability rating by his physician, Dr. German. *Id.*

Claimant testified that he was hired at Conbulk by Mr. Traver. Tr. 48. He had known Mr. Traver for a long time and had previously worked with him in other jobs. *Id.* Mr. Traver also had helped Claimant get a job at ATS before he came back to work for Employer. *Id.* Claimant could not recall whether he had told Mr. Traver about his knee problems when he was hired to work for Employer. *Id.*

Claimant suffered his stroke around May of 2000 while working at Conbulk. Tr. 49. During the course of his hospitalization, he was seen by Dr. Julia Mikell, a neurologist, whom he continued to see after his release. Tr. 49-50. He acknowledged that Dr. Mikell told him he should not be driving or using heavy machinery. Tr. 50. Employer did not terminate his employment after the stroke, and he was able to return to work with Employer. *Id.* In fact, Employer promoted him to stevedore foreman after he returned. *Id.*

Claimant did not seek medical treatment for his left knee until April of 2002, almost one year after the alleged March 2001 injury, when he saw Dr. Palmer. *Id.* He acknowledged that prior to the March 31, 2001 incident, he had been seeing Dr. Sauers and taking Vioxx for chronic knee pain, chronic back pain, arthritis in his hands, and an Achilles tendon injury. *Id.* Claimant also acknowledged that he saw Dr. Sauers on May 8, 2001, but never told about the March 31, 2001 injury. Tr. 51-52.⁶ He further testified that he never mentioned his injury to Dr. Shapiro, even though Dr. Shapiro was an orthopedic surgeon and was treating Claimant's Achilles tendon injury. Tr. 52. Claimant testified that the first time he ever informed any physician of the March 31, 2001 injury was when he saw Dr. Palmer in April 2002. *Id.*

Regarding his job search, Claimant testified that he reached various stages in the selection process with respect to the many of the positions he applied for. *Id.* For some, he sent out resumes and waited for a response. Tr. 53. For others, he attended interviews and waited for a decision. *Id.* Claimant testified that, to the best of his knowledge, none of these prospective employers refused to hire him because of the problems with his knees. *Id.* In fact, he never discussed his knee problems with them. *Id.*

Claimant testified that during the period of time between his termination by Employer on May 30, 2001 and his appointment with Dr. Palmer, he did not see any knee specialists. Tr. 54. He explained that he did not tell Dr. Sauers about his knees because he was not a knee specialist. *Id.* For the same reason he did not tell Dr. Beard and Dr. Mikell about his knees. *Id.*

⁵ Claimant worked for this employer from 1989 to 1996 (EX 10 at 4).

⁶ Dr. Sauers' treatment note for May 8, 2001 do not reflect any complaints of a knee injury on March 31, 2001 (EX 2 at 14). The record also contains Dr. Sauers' notes dated 5/22/01, 5/29/01, 6/29/01, and 7/11/01, which do not mention left knee complaints.

James S. Traver, Sr.

James Traver testified that he was then employed by Conbulk as a stevedore superintendent. Tr. 56. He had worked for Employer for a total of sixteen years, with a break in employment after the first ten years. *Id.* He met Claimant through his employment and has known him for over thirty years. *Id.* Specifically, when Traver worked in the Traffic Department, Claimant worked as a superintendent at the Eastcoast Terminal; and when Traver was the superintendent at Southern Bow, Claimant worked there as an assistant superintendent. Tr. 56-57. Traver testified that when Claimant was looking for a position through the labor pool, he hired Claimant to work for Conbulk as a clerk checker. *Id.* Approximately six months later, the Stevedoring Department at Conbulk put him in a stevedore position. Tr. 57.

Traver testified that he did not recall having any conversations with Claimant about his knees while Claimant was employed by Employer. *Id.* He recalled, however, having discussions on the phone with Claimant about his stroke while Claimant was recovering at home and after he returned to work. *Id.* Traver clarified that “[w]hen I say talked about it, I just asked him how he was doing. And apparently he was doing well enough to go to work.” *Id.* Traver testified that he saw Claimant at work almost every day, but he was not Claimant’s direct supervisor. Tr. 58. He stated that when Claimant became a stevedore, he was supervised by Harold McCarthy and another superintendent. *Id.*

When asked if he could recall any events surrounding Claimant’s alleged injury on March 31, 2001, Traver testified that he remembered “nothing.” *Id.* He further added:

I don’t remember anything about it at all. I don’t remember any conversation with Roy about his hurting his knee. I talked with Roy on the phone after the fact and at that time I told him, I just – I don’t remember him telling me anything about hurting his knee.

Id. He further testified that he did not recall having a conversation with Claimant at the picnic table on that day. *Id.* He added that “it wouldn’t be unusual for me to be at the picnic table in the morning and to speak to somebody. But I just don’t remember any conversation about his knee.” Tr. 59.

Traver testified that approximately one month after Claimant’s termination, Claimant asked him during a telephone conversation if he remembered anything about him hurting his knee on the gangway of the Snowbird. Traver testified that “[a]t that time I told him, Roy, I don’t remember the conversation. And I don’t.” *Id.* Traver further testified that he does not recall Claimant asking for medical treatment for any condition or injury during the time that they worked together. *Id.* Nor did he observe Claimant limping or wearing a muscle stimulator on his legs. Tr. 60. He added that when Claimant left the company in May of 2001, he did not appear to be having any physical problems affecting his ability to work. Tr. 60. He recalled that “when Roy first came back he had – he claimed he had a problem with his peripheral vision.” *Id.* Traver recalled that before returning to work, Claimant had told him over the phone that his doctor precluded him from returning to work until his eye cleared up because he could not drive. Eventually, Claimant was cleared to return to work and was able to see well enough to drive. *Id.*

During cross-examination, Traver testified that he had helped Claimant get a job with ATS. Tr. 61. He testified that Claimant never mentioned to him that he had been injured while working for ATS. *Id.* However, after Claimant came to work for Conbulk, Traver asked someone from ATS why Claimant stopped working there and was told that Claimant had injured his knee and, when he returned to work, was laid off due to business fluctuations at the port. Tr. 62. Traver testified that he was a labor coordinator when he hired Claimant from the labor pool to work for Employer. *Id.* He further testified that he would not have hired somebody to work for Employer if he had known the person to be either dishonest or non-productive. *Id.* He testified that having known Claimant for over thirty years, he had no reason to suspect that Claimant would be dishonest with him or anybody else. Tr. 63.

Joseph Hurst

On direct examination, Joseph Hurst testified that he worked as a stevedore foreman for Employer through Peoples Industries. Tr. 64-65. He has worked for Employer for over ten years and worked with Claimant when Claimant was a stevedore foreman. Tr. 65.

Hurst testified that he did not recall seeing Claimant slip, fall, or strike his knee on a handrail during the time that they worked together on the vessel Snowbird. *Id.* Indeed, he could not recall any incidents involving Claimant slipping and falling on a ship's gangway. *Id.* Nor did Claimant report any such injury to him. *Id.* Hurst also did not recall ever seeing Claimant wear a knee brace or any kind of muscle stimulator on his leg while they worked together. *Id.* Hurst testified that Claimant never complained to him about his knees. Tr. 66.

On cross-examination, Hurst testified that if Claimant was wearing a knee brace or a muscle stimulator under his pants, he would not have been able to see it. *Id.* He also testified that while he could not recall Claimant being injured on the gangway of Snowbird, he was not denying that it happened. *Id.*

Frank J. Rodriguez

Frank Rodriguez was deposed by Claimant's counsel on September 13, 2002. CX 10. On direct examination, Rodriguez testified that he currently works for Maersk Sealand as a maintenance supervisor. *Id.* at 6. Before he began working for this employer in June of 2001, he worked for Conbulk in Savannah, Georgia for approximately one year as a stevedore supervisor. *Id.* at 7. His duties consisted of "coordinate[ing] the lading and unlading of the break bulk cargo of the vessels that were tendered by [Employer]." *Id.*

Rodriguez testified that he knows Claimant, as they periodically worked together when they were both employed by Conbulk. *Id.* He testified that Claimant was also a stevedore supervisor. *Id.* Rodriguez also testified that he was unaware of the fact that Claimant had filed a claim for a work-related injury until the time of this deposition. *Id.* at 8.

Rodriguez was shown a copy of an "Exempt Employee Overtime Report" and acknowledged that this document listed his name and contained his handwriting. CX 10 at 8,

Dep. Ex. 2. He testified that the report reflects that on Friday, March 30, 2001, he worked from 0630 to 0200 on the Barge CG 682 and on Snowbird.⁷ *Id.* at 10. He explained that “[t]he Barge CG 682 is a Coast Guard barge with mica chips, and the Snowbird was what they called the chicken boat.” *Id.* Based on this record, Rodriguez testified that on March 30, 2001, “I coordinated the discharge of the barge which had mica chips, and I probably assisted the stevedores that were working the Snowbird in completing the Snowbird discharge of chicken and various other commodities.” *Id.*

Rodriguez further testified that, according to the report, he did not work on March 31, 2001 as he had this day off. He acknowledged that under this date there is a notation made in his handwriting which states “Barge CG 682/Snowbird.” *Id.* He explained that this notation probably means that “I was told I was going to work it and then sometime either the 30th or the 31st when I came in, which was usually the case, I was told that I could go home and take the day off by Mr. Harold McCarthy,” the stevedore superintendent in charge of all the stevedores. *Id.* at 11. He further testified that, according to the report, he had a day off on Sunday, April 1, 2001, but he did work on April 2. *Id.*

Rodriguez testified that, based on his recollection, this report accurately reflected the days that he worked or did not work. *Id.* at 12. He noted that “I filled it out, it’s accurate.” *Id.* He reiterated that on March 31, 2001, “like I said, Mr. McCarthy when I came in could have told me, you know, ‘you don’t need to work, you can go home,’ and that’s the reason why it looks that way.” *Id.*

Although he could not specify the exact date, Rodriguez testified that around March 31, April 1, or April 2, 2001, he had a conversation with Claimant regarding his alleged injury. *Id.* He testified:

Whatever day it was, what my recollection is, Roy and I usually got in early in the morning and we would run into each other at the parking area. What I again recollect was I saw him coming out of the vehicle, walking towards me with sort of a limp, and I turned around and I said “Hey, what’s wrong with you?” And then he said “Well I hurt my knee yesterday.” I don’t recall if he said in the daytime, in the nighttime, or if it was on the vessel. And that was the extent of the conversation we had.

Id. at 12-13. Rodriguez testified that he did not recall having any follow-up conversations on this subject. *Id.* at 3.

According to Rodriguez, he continued working for Employer for a couple of months after the alleged conversation in the parking lot, and he continued to see, and probably worked with, Claimant. *Id.* He did not recall seeing Claimant limp during that time. *Id.* He also testified that

⁷ The document corresponds with the deponent’s testimony but also reflects that he worked a total of 10.5 hours on that date. If he started work at 6:30 a.m. (*i.e.*, 0630) and worked for 10.5 hours, he would have finished working around 5:30 p.m. if he took a one-hour meal break. He did not explain why the “To Time” entry was reflected as “0200” (*i.e.*, 2:00 a.m.), although he specifically testified that he did not work on Saturday, March 31, 2001. CX 10 at 10-11.

he did not recall observing Claimant having a conversation with Jim Traver around the time that he ran into Claimant in the parking lot. *Id.*

On cross-examination, Rodriguez testified that the overtime report indicates that on April 2, 2001 he came to work at 6:30 p.m. and left at 9:00 a.m. *Id.* at 14. He explained that his shift started at 7:00 p.m., but he usually came in half an hour early to relieve the stevedore who worked before him and get briefed on the happenings of the day. *Id.* He denied saying earlier in his deposition that the parking lot incident conversation with Claimant occurred early in the morning. *Id.* He testified:

I said I don't remember what day it was; it was usually in the morning when we met if we both worked the same day. . . . We could have worked – coming in to work the same shift, he could have been coming in and I could have been coming from the vessel to the office to go home. There's a – there's a number of possibilities why we would have met at the parking lot and run into each other.

Id. at 15. When asked if it was even in April 2001 when this incident occurred, he testified:

It could have been maybe a year, year and a half. Like I said, I've been gone for a year, but I vaguely recall the conversation. I cannot put a date on it.

Id. He added that he stopped working for Employer between June 20 and 22, 2001 because he had to be in Charlotte on June 29th and he took a week off “to resolve some issues in Savannah.” *Id.* at 16. Rodriguez further testified that he could not recall which knee was causing Claimant's limp. *Id.* When asked whether Claimant had ever mentioned to him his history of knee problems, Rodriguez testified that Claimant had told him at some point that he had hurt his knee somewhere, but Rodriguez could not recall which knee it was or where Claimant said he hurt it. *Id.*

Rodriguez acknowledged that one of his responsibilities as a stevedore supervisor was to fill out documentation when someone reported a job injury so that Conbulk's management knew that an injury had occurred. *Id.* He testified that he did not know whether Claimant's job description required Claimant to perform this task. *Id.*

Rodriguez testified that Claimant called him about being a witness in this case less than a month before the deposition. Tr. 20. This was the only conversation he had with Claimant about testifying in this case. He also talked to Claimant's counsel about the case on one occasion. *Id.* He did not discuss this with anyone working for Employer. *Id.*

Medical Evidence

1. Medical records of Dr. David E. Sauers (2000-2001).

A note dated June 8, 2000, prepared by Dr. Sauers of the Southcoast Medical Associates Internal Medicine Division states that Claimant came in on that day to “establish care” because he needed a family doctor. The note outlines Claimant's medical history, including his April

2000 stroke and depression. It states that Claimant was permanently disabled at that time and was concerned about his disability. *Id.* Dr. Sauers noted, *inter alia*, a history of knee surgeries performed in 1998 and 1995. In the section entitled “Review of Systems,” Dr. Sauers noted “knee pain and arthritis.” EX 2 at 2. Claimant underwent a general physical examination at that time. Examination of Claimant’s extremities revealed “[s]atisfactory range of motion and coordination. No obvious phlebitis or edema detected.” *Id.* Dr. Sauers concluded that Claimant suffered from “[s]ignificant arthritis of his knees and hands, and some mild low back diminished range of motion.” *Id.*

Medical notes prepared by Dr. Sauers on June 15, June 19, June 20, and November 7, 2000 address various medical conditions other than Claimant’s knee problems (*e.g.*, depression, smoking, high cholesterol). EX 2 at 4-7. On August 24, 2000, Dr. Sauers again examined Claimant’s extremities and noted “[n]o obvious phlebitis or edema. Satisfactory range of motion and coordination noted.” EX 2 at 8.

A note dated September 7, 2000 addressed Claimant’s complaint of pain in his left heel at the site of his Achilles’ tendon. EX 2 at 9.

On May 8, 2001, Dr. Sauers again performed a medical examination of Claimant. His report notes that Claimant

Complain[ed] of right flank pain with some bloating and right upper quadrant pain. It does not really go down to his groin, down his back, legs, etc. He has known back disease which has been chronic, but this is different. He has actually been out of work for a couple of days because of the pain and discomfort and spasms. Generally, however, he has been doing well but his pressure is not well controlled.

EX 2 at 14. The note also discusses Claimant’s blood-pressure and stroke-related neurological problems and mentions a possibility of diabetes. Dr. Sauers performed a thorough physical examination with respect to Claimant’s vital signs, eyes, neck, heart, chest, abdomen and musculoskeletal function. EX 2 at 13. In the “musculoskeletal” section, he noted that Claimant reported “[m]ild shoulder discomfort posteriorly. Lumbar back is tender with paralumbar spasm, but his lower extremities are unremarkable with no signs of any radicular changes.” EX 2 at 13. In the medical history section Dr. Sauers noted, *inter alia*, a past history of degenerative arthritis of knees and joints. EX 2 at 14. Among other “impressions,” he noted “[r]ight flank and right upper quadrant pain” and “[c]hronic back pain.”

On July 11, 2001, Dr. Sauers again met with Claimant and performed a physical examination.⁸ His notes state that Claimant “is about to take a trip to South America where he will stevedore a ship. Generally, he has been doing well.” EX 2 at 18. After discussing Claimant’s various medical conditions, Dr. Sauers stated that “[h]e has had no discomfort, etc.” The only comment with respect to Claimant’s extremities made in the “physical examination”

⁸ The record also contains Dr. Sauers’ notes dated May 22 and 29, 2001 (EX 2 at 15-17). However, it appears that these notes are not based on actual appointments with Claimant, but were made by Dr. Sauers upon reviewing Claimant’s test results in between his appointments (EX 2 at 15-17).

section states “[n]o edema.” In the “impressions” section, Dr. Sauers noted, *inter alia*, arthritis in Claimant’s back and, for the first time, diabetes.

2. Medical records of Dr. Stephen C. Allen and Dr. Steven L. Shapiro concerning Claimant’s Achilles tendon injury (2001-2002).

Dr. Stephen C. Allen of the LifeCare Center examined Claimant on August 16, 2001. His examination report describes in detail Claimant’s complaint regarding left heel pain. It states, in part, that Claimant had

[A] four [4] month history of left heel pain. In the past week, the pain has been increasingly severe. He has taken Vioxx and two [2] weeks ago began a course of prednisone tapering over a six [6] day period. He felt somewhat better while he was on the prednisone, but then the pain returned and now he can hardly walk. . . . He denies injury. He first noticed this following a trip to Las Vegas . . .

He ambulates with a limp hardly being able to push off with the left foot. He has good range-of-motion of his hips. His knees lack 10-15 degrees of flexion and 5 degrees of full extension. His ankles are stable. His feet are stable.

EX 3 at 10.

As part of Claimant’s past medical history, Dr. Allen noted that he had had bilateral knee surgery. He diagnosed Claimant with retrocalcaneal bursitis and Haglund’s exostosis.

Claimant returned for a follow up appointment with Dr. Allen on September 6, 2001. Dr. Allen’s report states:

Follow-up for retrocalcaneal heel pain which is less though he still has tenderness which responds well to icing. He did not have good relief with Vioxx. . . . He has a new complaint of pain under the great toenail. He denies injury or accident.

EX 3 at 8. Dr. Allen added a diagnosis of ingrown toenail to Claimant’s previous diagnoses.

Claimant was also seen for his Achilles tendon injury and associated left heel pain on several occasions by Dr. Steven L. Shapiro of the LifeCare Center.⁹ On October 25, 2001, Dr. Shapiro described Claimant’s injury as follows: “he misstepped as he stood, tripped coming down hard on the left foot. He had immediate pain in the back of the leg and ankle. He iced and then applied a TENS unit and over time the hindfoot became ecchymotic and swollen.” EX 3 at 7. He also noted that Claimant “has been taking Vioxx for the leg or heel pain.” According to the aforementioned reports, as part of his treatment, Claimant was initially placed into a short-leg walking cast with crutches for seven to ten days, and was later placed into an aircast boot and prescribed physical therapy.

3. Medical records concerning Claimant’s 1994 and 1998 knee injuries.

⁹ He was seen on October 25, November 5, 20, and 26, 2001 and February 11, 2002 (EX 3 at 1-7).

A number of medical reports address Claimant's 1998 right knee injury. Several reports were prepared by Dr. Murray of Chatham Orthopaedic Associates. EX 7. On August 6, 1998, one day after his injury, Claimant was diagnosed with knee sprain with effusion, placed in a knee immobilizer and crutches, prescribed medication, and ordered to keep his leg elevated, apply ice on and off for the next 24 hours and then apply moist heat. EX 6 at 1. Dr. Murray's report also mentions "follow up with workman's comp orthopedist." According to Dr. Murray, Claimant had sustained a right knee injury on August 5, 1998 "when he stepped on a cross tie and slipped off of it, twisting his knee as he landed." EX 7 at 6. Dr. Murray noted that Claimant had swelling and pain, and felt that this injury was much worse than his 1994 left knee injury. Subsequent reports describe Claimant's August 1998 surgery and other treatments, including a knee immobilizer, ice, and pain relief medications. EX 7 at 1-11.

The record also contains a number of medical notes prepared in 1994 addressing Claimant's left knee injury, subsequent surgery, and complications that followed. EX 6 at 3-8. According to a medical report, Claimant had "slipped on an oily surface in the past, and unfortunately has suffered some knee problems since that time." EX 6 at 5. On August 12, 1994, Claimant underwent arthroscopy of the left knee performed by Dr. Gorman. EX 6 at 7. Dr. Gorman continued to see Claimant at Candler Hospital for his post-surgery concerns and complications at least through December of 1994. EX 6 at 3, 7. Specifically, Dr. Gorman was involved in Claimant's treatment when he was admitted to the Candler Hospital on December 16, 1994 with left knee pain and swelling. EX 6 at 3. His knee was drained and cultured, and he was treated for cellulites and infection of the left knee. EX 6 at 5.

4. Medical records prepared by Dr. David N. Palmer (2002).

The only medical evidence offered by Claimant in support of his claim are treatment records prepared by Dr. David Palmer of Orthopedic Center, P.C. CX 9. A report dated April 8, 2002, over one year after Claimant's alleged March 2001 accident, states, *inter alia*:

Mr. Burton . . . has been in our practice for some time. He has previously had scopes by Dr. German and has seen Dr. Nettles in the past. He had a knee arthroscopy previously and subsequently had an infection in the knee. This has long since resolved but he has reinjured the knee about a year ago. He slipped on a ship's gangway and heard a pop in the knee. He had increased swelling in the knee. Since that time he has had increasing pain and medical joint pain. He has inability to squat and kneel and problems climbing stairs as well.

CX 9 at 4.

In the "physical exam" section, Dr. Palmer stated: "reveals some mild effusion of the left knee with significant medial joint line tenderness with positive Apley grind. Lachman's is negative. He has no opening to varus and valgus stress." *Id.* In addition "[p]lain radiographs taken here in the office today show a moderate amount of degenerative changes. He still has joint space present. Most of the wear is on the medial side." *Id.* Dr. Palmer concluded that

Claimant had osteoarthritis of the knee. He treated Claimant with an injection and noted that Claimant was “on Vioxx for a previous Achilles rupture as well.” *Id.*

On May 13, 2002, Claimant saw Dr. Palmer for the second time. CX 9 at 5. Dr. Palmer’s report states:

Mr. Burton is still having significant pain in his knees. He is here for followup. He got fleeting relief from the injection last time. He wanted to have an injection today but I think it is a little too soon. I do think he aggravated a preexisting arthritis in his knee when he fell on the ship’s gangway about a year ago. At this point I would give him limitations which include no climbing ladders, no bending or stooping and no prolonged standing or walking. I do feel that in the future he is going to need to have a knee replacement but again, he is too young to have this at this point.

My recommendations for this gentleman is to perform some form of low demand job such as managerial foreman type position or sit down work. I want him to continue taking his Vioxx for the arthritic pain. I will see him back as needed.

Id.

Dr. Palmer also saw Claimant on December 2, 2002. At this time he noted:

Mr. Burton comes in I think just for evaluation for work evaluation [sic]. Mainly I have been seeing him for his knees. Dr. Shapiro has been seeing him for his Achilles tendon. . . . From my standpoint I think he can work. He does have some limitations but he can work. He seems to want to not be able to work at all for some reason. At any rate, I have filled out a whole sheet here in regards to his work abilities for his knees.¹⁰ From my standpoint I will see him back as needed. I have gone ahead and discharged him from my office today.

CX 9 at 6.

5. Other medical evidence.

The record also contains several “Workers Compensation Status Reports” prepared by Industrial Healthcare Management in Garden City, Georgia, referring to an injury that occurred in July of 1997.¹¹ EX 6 at 10

In addition, the record contains medical reports of Dr. Beard (September 26, 2001) (EX 4) and Dr. Bottner (June 29, 2000, June 13, 2001) (EX 5) of Savannah Cardiology concerning Claimant’s heart condition; medical records from St. Joseph’s/Candler Health System concerning Claimant’s stroke and related complaints (May 26 and 27, 2000) (EX 5, 8); and

¹⁰ The parties did not submit this document into evidence.

¹¹ The report dated 7/21/97 refers to a lumbar ligament sprain and sciatica; the report dated 7/29/97 refers to lumbar sprain and right forearm strain; another report dated 8/14/97 refers to lumbar sprain. EX 6 at 12, 14, 16.

reports regarding various neurological consultations concerning Claimant's stroke (July 10, 2000, November 5, 2000). EX 8, 9.

IV. DISCUSSION

Injury Arising Out of and In the Course of Employment.

Claimant bases his claim for disability and medical benefits under the Act solely on an injury which allegedly occurred on March 31, 2001 when he was walking down a gangway from the vessel "Snowbird" to the adjacent pier. *See, e.g.,* Employee's Brief in Support of His Claim for Benefits ("Cl. Br.") at 5. The evidence he offers in support of this claim consists of the testimony of himself and Frank Rodriguez. As explained below, I do not find that testimony credible, and, consequently, will deny his claim for benefits.

According to Section 20(a) of the LHWCA, "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). "Section 20(a) . . . provides claimant with a presumption that his injury is causally related to his employment if claimant establishes a harm and that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm." *Uglesich v. Steverdoring Servs. of Am.*, 24 B.R.B.S. 180, 182 (1991) (*citing Blake v. Bethlehem Steel Corp.*, 21 B.R.B.S. 49 (1988)). However, before availing himself of the Section 20(a) presumptions, a Claimant must establish that the employment events claimed to be the cause of the harm in fact occurred. *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309, 312 (1977); *see also Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 127, 128 (1997), *reconsideration denied en banc*, 32 BRBS 134 (1998); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

Claimant testified that he was the last person leaving the vessel Snowbird at 3:00 a.m. on March 31, 2001 when he slipped on the gangway and injured his left knee. Tr. 24. He further testified that his accident was witnessed by Joey Hurst and an unidentified black man, and that he reported the incident Jim Traver. Tr. 25. Claimant also testified that he did not pursue treatment for his injury at that time because he had only recently returned to work after having been off for an extended period due to a stroke and was concerned that he might lose his job. Tr. 25-26. Finally, he testified that he self-treated his injury after the accident with Vioxx, a muscle stimulator, ice packs, and a knee brace. Tr. 28. This testimony simply is not credible given the other evidence of record.

Claimant suffered work-related injuries on numerous prior occasions, and, unlike the alleged injury sustained by him on March 31, 2001, reported those injuries to his employers, and thereafter sought treatment. Tr. 46-48. For example, he injured his left knee in 1994, missed several months of work, and was awarded a 15 percent permanent partial disability rating for that injury. In 1997, he injured his back, reported the injury, received medical treatment, and was off work for about four weeks. In 1998, he injured his right knee, reported the injury, had surgery, and was off work for about three months. Claimant was thus clearly aware of the process for reporting work-related injuries, and the benefits of doing so with respect to disability

compensation. Indeed, his job at Conbulk at the time of the alleged March 31, 2001 injury included ensuring that the people he supervised reported such injuries. Tr. 45. His claim that he was concerned about losing his job if he took any time off due to his injury rings hollow in light of his prior injuries and knowledge of the benefits which may be derived through the workers' compensation system.

In addition, Claimant's testimony that he informed his friend of 30 years, Jim Traver, about the incident on March 31, 2001 was not confirmed by Traver. Traver had no recollection of ever having a conversation with Claimant on or about that date concerning the alleged accident, and he never saw Claimant limping from then until he was laid off by Conbulk on May 30, 2001. Traver testified that he saw claimant on virtually a daily basis. Tr. 58-60.

Similarly, Joseph Hurst, who was allegedly in front of Claimant on the gangway when he fell and injured himself, had no recollection whatsoever of the incident, never saw Claimant wearing a knee brace or using a muscle stimulator thereafter, and never heard any complaints from Claimant about knee pain. Tr. 65-66. Nor could Claimant identify or produce the other individual who was supposedly with Hurst when the accident occurred.

Despite his alleged injury, Claimant continued to work at Conbulk without any reported absences after March 31, 2002, and he left that employment on May 30, 2001 due to a stevedore restructuring by Employer, not because of any physical impairment. Tr. 30-32. He clearly felt physically capable of working after leaving Conbulk, given his acceptance of a stevedore position in South America shortly thereafter. He ultimately decided not to take the job for reasons totally unrelated to any physical problems. Tr. 43. Claimant in fact worked at other jobs after May 2001 and left those positions for reasons completely unrelated to his alleged left knee injury.

Most importantly, between March 2001 and April 2002, he was seen by several treating physicians and never reported to any of them either that he had sustained an injury at work on March 31, 2001 or that he was having problems with his left knee. For example, on May 8, 2001, approximately five weeks after the alleged accident, Claimant was seen by Dr. Sauers for complaints of "right flank pain." EX 2 at 14. Claimant made no mention of having sustained a knee injury on March 31st, and Dr. Sauers' physical examination of the lower extremities was "unremarkable." *Id.* at 13. On June 13, 2001, Claimant was seen by Dr. Randy K. Bottner at Savannah Cardiology complaining of dyspnea. EX 5. He told Dr. Bottner that he had been under psychological stress due to having recently been laid off from work, an event about which he was concerned "in the recent past, predating the onset of these symptoms." *Id.* at 1. Claimant did not attribute his stress, or his departure from work, to any physical injuries. *Ibid.* Dr. Bottner's physical examination of Claimant's extremities was normal, revealing no cyanosis, clubbing, or edema, and there were no sensory or motor deficiencies noted bilaterally. *Ibid.* Claimant was seen again by Dr. Sauers on July 11, 2001 for blood tests, and he told Dr. Sauers at that time he was "about to take a trip to South America where he will stevedore a ship." EX 2 at 18. He reported that he "has been doing rather well lately" and again made no mention of any March 2001 knee injury. The only notation in Dr. Sauers' report with respect to Claimant's extremities was "[n]o edema." *Ibid.* On August 16, 2001, Claimant saw Dr. Stephen Allen for

complaints of left heel pain during the preceding four months (*i.e.*, since April 2001). EX 3. Dr. Allen's report notes:

He denies injury. He first noticed this following a trip to Las Vegas and on the day he returned, he mowed the lawn sitting and when he stepped off the lawn mower he had the severe pain.

Id. at 10. Past medical history reflected in the report notes atrial fibrillation, stroke, and bilateral knee surgery. *Ibid.* Dr. Allen's description of his physical examination notes, in part:

He ambulates with a limp hardly being able to push off with the left foot. He has good range-of-motion of his hips. His knees lack 10 – 15 degrees of flexion and 5 degrees of full extension. . . .

Id. at 11. Despite the fact that he specifically saw Dr. Allen for treatment with respect to his left lower extremity, he made no mention of any March 31, 2001 injury to his left knee.¹² *Ibid.* On September 26, 2001, Claimant was seen by Dr. Robert Beard and described to him several medical problems including atrial fibrillation, hyperlipidemia, hypertension, arthritis of the knees, and diabetes mellitus. EX 4 at 1. The only reference to Claimant's knees in Dr. Beard's report states:

With respect to his past surgical history, Dr. Tom German did knee surgery on the right on two occasions; once as a result of a job injury and the second time as a result of infection in the knee. He has had arthroscopic surgery by Dr. Sam Murray more recently on the left knee, in August of 1998.

Ibid. There was no mention of any March 31, 2001 left knee injury despite the fact that Claimant wanted to "be sure he is followed up closely because of his several medical problems above listed." *Ibid.* Dr. Beard's examination of the extremities revealed no cyanosis, clubbing, or edema, and his reflex, sensory, motor, and gait examinations were all normal. *Ibid.*

The first mention by Claimant to a treating physician of any accident on or around March 31, 2001 was in April 2002, thirteen months after the alleged incident. CX 9. Claimant saw Dr. David Palmer on April 8, 2002 and the report of that visit states, in relevant part:

Mr. Burton is a 56-year-old gentleman who has been in our practice for some time. He has previously had scopes by Dr. German and has seen Dr. Nettles in the past. He had a knee arthroscopy previously and subsequently had an infection in the knee. This has long since resolved but he has reinjured the knee about a year ago. He slipped on a ship's gangway and heard a pop in the knee. He had increased swelling in the knee. Since that time he has had increasing pain and

¹² Claimant was also seen for his left foot pain by Dr. Allen on September 6, and October 25, 2001, and by Dr. Steven Shapiro, Dr. Allen's partner, on November 20, November 26, December 5, December 26, 2001, and February 11, 2002. EX 3 at 1-9. None of the reports of these visits reflects any mention of left knee pain or an accident on March 31, 2001 that might have caused or contributed to the left lower extremity problems Claimant was experiencing when ambulating.

medial joint pain. He has inability to squat and kneel and problems climbing stairs as well.

Id. at 4. The impression was osteoarthritis of the knee. *Ibid.* A treatment note dated May 13, 2002 by Dr. Palmer opines that Claimant's preexisting arthritis in the left knee was aggravated by his fall "on the ship's gangway about a year ago." *Id.* at 5. The last treatment note from Dr. Palmer is dated December 2, 2002 and states, in its entirety:

Mr. Burton comes in I think just for evaluation for work evaluation [sic]. Mainly I have been seeing him for his knees. Dr. Shapiro has been seeing him for his Achilles tendon. He also has eye problems. From my standpoint I think he can work. He does have some limitations but he can work. *He seems to want to not be able to work at all for some reason.* At any rate, I have filled out a whole sheet here in regards to his work abilities for his knees. From my standpoint I will see him back as needed. I have gone ahead and discharged him from my office today.

Id. at 6 (italics added). Dr. Palmer's note clearly suggests that Claimant had a motive other than his physical limitations for not wanting to work, *e.g.*, financial gain.

The only other evidence offered by Claimant in support of his claim that a work-related injury occurred on March 31, 2001, is the deposition testimony of Frank Rodriguez. CX 10. Rodriguez worked for Conbulk for approximately one year as a stevedore supervisor. *Id.* at 7. He worked with Claimant at times during his employment there. *Ibid.* On March 30, 2001, the day before Claimant's alleged injury, Rodriguez was overseeing the unloading of a Coast Guard barge and then "probably assisted the stevedores that were working the Snowbird in completing the Snowbird discharge of chicken and various other commodities." *Id.* at 10. He did not work on March 31 or April 1, 2001. *Id.* at 10-11, Dep. Ex. 2. He next worked the night shift on April 2, 2001 beginning at 6:30 p.m. *Id.* at 11. With regard to Claimant's alleged injury, Rodriguez testified:

Whatever day it was, what my recollection is, Roy and I usually got in early in the morning and we would run into each other at the parking area. What I again recollect was I saw him coming out of the vehicle, walking towards me with sort of a limp, and I turned around and I said "Hey, what's wrong with you?" And then he said "Well I hurt my knee yesterday." I don't recall if he said in the daytime, in the nighttime, or if it was on the vessel. And that was the extent of the conversation we had.

Id. at 12-13. He did not recall any further conversations with Claimant. *Id.* at 13. He saw, and even worked with, Claimant thereafter but did not recall ever again seeing Claimant limp. *Ibid.*

Based on a review of Rodriguez's testimony, it is clear he had no direct knowledge of any accident involving Claimant on the gangway between the Snowbird and the adjacent pier. He was not working on either the day of the alleged incident, *or the following day*, and his testimony that Claimant told him "I hurt my knee yesterday" is inconsistent with a finding that the conversation occurred on April 1, 2001 (the day following Claimant's alleged injury) since

Rodriguez was clearly off that day. *See* Dep. Ex. 2. Indeed, Rodriguez subsequently testified that the conversation could have taken place sometime other than April 2001. CX 10 at 15. He stated: “It could have been maybe a year, year and a half. Like I said, I’ve been gone for a year, but I vaguely recall the conversation. I cannot put a date on it.” *Ibid.* Rodriguez also could not recall which leg was bothering Claimant on the day of the alleged conversation, and he knew that Claimant had a history of a prior knee injury. *Id.* at 16. He confirmed that he could not say whether the conversation related to an injury sustained by Claimant at work or at home, and he does not recall ever having another conversation with Claimant about his knee or seeing him limping again. *Id.* at 16-18. Rodriguez also acknowledged that he and Claimant had developed a “colleague relationship” after they both left Conbulk, and that he spoke with him “every so often to see how he was doing, how his family was, grandchildren, things like that.” *Id.* at 19. Despite these contacts, he could offer no further information with respect to Claimant’s alleged March 31, 2001 injury.

In light of the vagueness of Rodriguez’s testimony, including his admission that he did not know when Claimant allegedly made the statement that “I hurt my knee yesterday,” I find that such testimony does not support a finding that Claimant sustained a work-related injury on March 31, 2001. Based on my prior finding that Claimant’s testimony concerning his alleged March 31, 2001 injury is not credible, I therefore find that Claimant has failed to prove by a preponderance of the evidence that he sustained an injury on that date while working for Employer.

ORDER

It is hereby ordered that the claim of Roy Burton for disability and medical benefits under the Act is denied.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.